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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-183

THE AGUA CALIENTE BAND OF MISSION INDIANS, by and through its TRIBAL COUNCIL, and DORA JOYCE PRIETO, PRISCILLA GONZALES, GLORIA GILLETTEE, PATRICK PATENCIO and LAWRENCE PIERCE, Allottees, Individually and in Class Action, on behalf of ALL ALLOTTEES of Allotted land on the AGUA CALIENTE BAND OF MISSION INDIANS RESERVATION,

Petitioners,

VS.

THE COUNTY OF RIVERSIDE, a Political Subdivision of the STATE OF CALIFORNIA,

Respondents.

BRIEF OF NATIVE AMERICAN RIGHTS FUND, CALIFORNIA INDIAN LEGAL SERVICES, AND DINEBEIINA NAHIILNA BE AGADITAHE AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTEREST OF AMICI CURIAE

Petitioners and Respondents have filed with the Clerk of the Court a written stipulation consenting to the filing of this brief. *Amici* each have a considerable interest in the outcome of the case and are particularly qualified in the specialized area of Indian law.

Native American Rights Fund is a non-profit corporation providing legal representation and counsel to Indians and Indian tribes throughout the country in cases of major significance. The Fund is supported principally by private grants and contributions. It participates as *amicus curiae* in this case because of the broad importance and impact which the decision will have on all of its clients and upon every Indian tribe in the country which possesses land.

California Indian Legal Services (CILS), and Dinebeiina Nahiilna Be Agaditahe (DNA), are non-profit corporations supported by the Legal Services Program of the federal Office of Economic Opportunity. CILS is a state-wide program providing legal assistance to low income Indians and Indian tribes in California and has been especially active in the area of law related to Indian resources and in economic development activities. DNA operates within the Navajo Indian Reservation in Arizona, New Mexico and Utah, representing Indians who otherwise would be unable to afford legal counsel. Both CILS and DNA regularly represent clients whose interests will be seriously affected by the decision in this case.

Statement

The decision below of the Ninth Circuit Court of Appeals, affirms the ruling of the District Court for the Central District of California, that the state, acting through one of its counties, may impose a real property ad valorem tax upon leasehold interests in lands held in trust by the United States for Indians. This holding raises grave questions of federal Indian law and public policy.

In a case of first impression before this Court, important issues are raised concerning:

a. Whether a state may impose a property tax on lessees, the incidence of which is on Indian beneficial owners and

lessors of the property, in spite of statutory language guaranteeing the land to the Indians "free of encumbrance" and specifically prohibiting its taxation;

b. Whether such a tax interferes with the sovereignty of Indian tribes by impairing the ability of the tribe to impose its own tax;

c. Whether such a tax can be sustained although it frustrates a clear federal policy and program of encouraging the leasing of Indian lands as a means of attaining economic development and self-sufficiency; and

d. Whether Congress has, by its careful supervision of the Indian leasing program, occupied the field to the extent that state taxation of leasehold interests is precluded.

Reasons for Granting the Writ

Amici join with Petitioners in asserting all the reasons contained in the Petition for a Writ of Certiorari. The Petition comprehensively discusses the several areas in which the courts below erred and the reasons why this Court ought to review the matter. *Amici* wish to place special emphasis in this brief on the consequences of the decision below for Indians throughout the nation and its impact on federal Indian policy.

1. **The case raises issues under federal law of broad national importance.**

Through the accidents of history, a patch of the vast desert east of Los Angeles has become a well-known playground for the wealthy. Palm Springs, coincidentally, is the location of lands set aside for the Agua Caliente Band of Mission Indians. It was no special gesture of altruism which led the United States to reserve the checkerboard of noncontiguous sections of land for the Agua Caliente Indians;

the land was just another arid, then rather undesirable, part of a newly settled state. The fact that the lands of the Agua Caliente Tribe have skyrocketed in value makes the tribe, along with a few other tribes nationally (such as some whose lands happened to be situated over rich oil pools or mineral deposits), an exception to the rule that the least attractive, most unproductive lands in the nation were reserved to Indians.

> The first Americans — the Indians — are the most deprived and most isolated minority group in our nation. On virtually every scale of measurement — employment, income, education, health — the condition of the Indian people ranks at the bottom.
>
> * * *
>
> Economic deprivation is among the most serious of Indian problems. Unemployment among Indians is ten times the national average; the unemployment rate runs as high as 80 percent on some of the poorest reservations. Eighty percent of reservation Indians have an income which falls below the poverty line; the average annual income for such families is only $1,500. As I said in September of 1968, it is critically important that the Federal government support and encourage efforts which help Indians develop their own economic infrastructure.

Richard M. Nixon, Message to Congress, July 8, 1970, 1970 U.S. Code, Cong. & Admin. News, pp. 2965-2974.

The destiny of Indians and Indian communities throughout the United States is dependent upon their ability to utilize productively their remaining lands and natural resources. The federal government has acknowledged its trust

responsibility to Indians, which arises out of a history of unfortunate relations between the nation and its original inhabitants. In pursuance and fulfillment of this responsibility, the government has afforded certain advantages to its Indian wards. Special treatment and programs for Indians are necessary to compensate for unconscionable dealings with the Indians in the past, and to remedy the most alarming present state of abysmal poverty and despair that typifies Indian communities.[1]

The United States recognized that the reservation system imposed severe limitations on the ability of Indians to maintain a livelihood. Limitation of land area changed traditional patterns of living; confinement to lands which were unfertile and short of water made it difficult to eke out even a subsistence standard of living; and removal to new, often strange areas was destructive of family and community which is the basis of cultural identity and social structure.

With a gradual decline in direct subsidies and a realization that paternalism would only foster continued dependence, came a policy of encouraging economic development and self-sufficiency. This policy was implemented by means of

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[1]It is the primary purpose of the Bureau of Indian Affairs to implement a federal policy of changing this situation.

Every year, as part of its proposed budget for the coming fiscal year, the Bureau of Indian Affairs makes the following statement to the House and Senate Appropriation Subcommittees considering its budget request:

> The ultimate goals of the Bureau of Indian Affairs for the Indian people are maximum economic self-sufficiency, equal participation in American life and equal citizenship privileges and responsibilities. The Bureau is working toward the attainment of these goals through two basic programs, one of which is education, and the other is the economic development of reservation resources.

See, e.g., Hearings, House Subcommittee on Appropriation for the Department of the Interior and Related Agencies for Fiscal Year 1969 at p. 744.

For a full discussion of the goals, problems, and needs of the national program for Indian economic development, see Joint Committee Print, Subcommittee on Economy in Government of the Joint Economic Committee, "Toward Economic Development for Native American Communities," 91st Cong., 1st Sess., 1969.

several programs and incentives. The Indian Leasing Act (25 U.S.C. §415) is one of the most successful federal programs designed to meet the nation's obligation to the Indians and to break the cycle of poverty. The future of that program is in grave doubt if Indians lose by judicial fiat the slim but important margin of advantage Congress has afforded them through exemption of their land and its income from taxation.[2]

It was demonstrated in the district court below that property tax exemption is an effective means of increasing the development of trust land that would otherwise be of little interest to developers. Application of the tax, on the other hand, has adverse consequences upon the Indian lessors. At Agua Caliente, imposition of the tax has resulted in rent arrearages, lease defaults, and seizures by the county of interests in Indian land. Because of the tax, lower rentals must be accepted and, in fact, fewer leases are made.

There is no doubt that, while the possessory interest tax in question is collected from lessees, the impact of the tax is upon the Indian lessors. The Court of Appeals below concluded:

> [A] lessee can pay more rent if he is not required to pay a possessory interest tax. If an Indian's land is not subject to that tax, he enjoys a better bargaining position than he otherwise would, and hence the tax has an adverse economic effect upon him.

Agua Caliente Band of Mission Indians v. County of Riverside, No. 25, 298 (9th Cir., May 12, 1971), slip opinion, p. 4.

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[2]It has been held that tax exemption is a property right vested in the Indians, *Choate v. Trapp*, 224 U.S. 665 (1912).

The effect of the possessory interest tax is to frustrate severely the federal goal of encouraging Indians to utilize their land to become economically self-sufficient. The tax has had this effect even on the Agua Caliente Band of Mission Indians, who are in a much better financial position than most Indians. If the tax can be so damaging to the Agua Calientes, it is not hard to comprehend the devastating effects similar taxes would have on less fortunate Indians.

The effects of this tax will not be confined to the few score Indians who are fortunate enough to belong to the exceptionally desirable and valuable Agua Caliente Indian Reservation in Southern California. Nearly every tribe and Indian holding any land is subjected to a potential economic threat if the legality of taxation of leasehold interests in Indian lands by states is sustained. At the present time, about twenty per cent of all Indian trust land is leased, accounting for substantial annual revenues to the Indian beneficial owners.[3]

This Court has many times considered whether various forms of state and federal taxation are applicable to Indians.[4] This case, however, presents a serious new question for the court's decision. Riding on the decision may be the success of an Indian leasing program which provides some measure of hope in the future for the country's most disadvantaged minority. A matter of such grave importance demands the attention of this Court. *Williams v. Lee*, 358

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[3]Revenues amounted to about $57,000,000 in fiscal 1970 for about 55,408,000 acres under lease. Bureau of Indian Affairs, Office of Economic Development, Real Property Management, *Annual Report on Indian Lands and Income from Mineral and Surface Leases* (June, 1970).

[4]E.g., *Squire v. Capoeman*, 351 U.S. 1 (1956); *Board of Commissioners v. Seber*, 318 U.S. 705 (1943); *Superintendent of Five Civilized Tribes v. Commissioner*, 295 U.S. 418 (1935); *Choteau v. Burnet* 283 U.S. 691 (1931); *Carpenter v. Shaw*, 280 U.S. 363 (1930); *Choate v. Trapp*, 224 U.S. 665 (1912); *United States v. Rickert*, 188 U.S. 432 (1903); *The Kansas Indians*, 72 U.S. 737 (1866).

U.S. 217 (1959); *cf. United States v. Coleman*, 390 U.S. 599 (1968).

2. The decision of the Court of Appeals did not have the full support of the panel and was questionable on the merits.

The Ninth Circuit Court of Appeals ruled below in a two to one decision that, under the precedents of this Supreme Court, the State of California could impose a possessory interest tax on leasehold interests in Indian lands. Judge Smith[5] writing for the majority, found the arguments of Petitioners "persuasive" but reluctantly concludes that two decisions of this Court, *United States v. Detroit*, 355 U.S. 466 (1958), and *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342 (1949), are dispositive of this case adversely to Petitioners. Circuit Judge Ely, in a strong dissent, found that the two cases are rather clearly and logically distinguishable. The inapplicability of *United States v. Detroit* and *Oklahoma Tax Commission* is cogently explained in the Petition for Certiorari. Judge Ely found, and we urge, that the most compelling reason for striking down the county tax as it applies to Indians is the superior federal policy of protecting and advancing Indian interests.

Also, the court below ignored the urgings of Petitioners and *amici curiae* that federal statutes specifically prohibit taxation by setting aside the lands in question "in trust for the sole use and benefit" of the Indians to be conveyed to them at the end of the trust period "free of all charge or encumbrance whatsoever" Mission Indian Relief Act of 1891, 26 Stat. 712. Other statutes and regulations which would prevent taxation of Indian lands by the county were not dealt with. *E.g.*, 28 U.S.C. §1360(b); 25 C.F.R. pt. 1.4.

Furthermore, an infringement upon tribal sovereignty is

[5]District Judge, District of Montana, sitting by designation.

inherent in the scheme to tax leasehold interests in Indian lands. It is clear that the right of an Indian tribe to govern itself includes the authority to collect revenue.[6] As a practical matter, the county tax completely undermines the authority; if the tribe were to insist that its tax be paid on top of the county's tax, leasing of Indian land would not be economically feasible. The Court of Appeals did not address itself to the sovereignty issue. To allow a county to impose its tax on Indian land in the face of tribal jurisdiction to tax contradicts the principle that "two self-governing bodies cannot have dual and co-existent jurisdiction and control within the same territory at the same time." *Your Food Stores v. Village of Espanola*, 68 N.M. 327, 361 P.2d 950, 956 (1961), *cert. denied* 368 U.S. 915 (1961); see also *Iron Crow v. Oglala Sioux Tribe*, 231 F. 2d 89 (8th Cir. 1956).

Because of extensive legislation and activity in the field of Indian leasing[7], it is reasonable to conclude that the federal government has preempted the field and that Congress did not intend that national Indian policy would be dependent upon fluctuating local tax rates and differing schemes of taxation. *See, e.g., Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685 (1965). Again, the court below did not even discuss the argument.

The two majority members of the court which decided the case below rested their holding on precedent from two inapplicable cases, failed to consider statutory prohibitions against taxation, and did not reckon with the questions of impairment of tribal sovereignty or federal preemption. Only

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[6] *Merris v. Hitchcock*, 194 U.S. 384 (1904); *Iron Crow v. Oglala Sioux Tribe of Pine Ridge Reservation*, 231 F. 2d 89 (8th Cir. 1956); *Buster v. Wright*, 135 Fed. 947 (8th Cir. 1905), *appeal dismissed* 203 U.S. 599 (1906). *See generally*, United States Department of the Interior, *Federal Indian Law* (1958), pp. 435 *et seq.*

[7] *E.g.*, 25 U.S.C. §§415 *et seq.*; 25 C.F.R. part 131 *et seq.*

the dissenting judge perceived the great importance of the federal policy concerning Indian economic development and the destructive impact on this policy which results from allowing local governments to tax Indian leaseholds. In a case such as this, where there has been a questionable or doubtful determination in the court below, it is appropriate to grant certiorari. *E.g., Williams v. Lee,* 358 U.S. 217 (1959).

3. **In exercising its supervisory power over federal courts, the Supreme Court should review cases in which the judiciary has invaded the province of the legislative branch.**

The individual case of the Agua Caliente Indians may move a court to conclude that tax exemption results in an unfair advantage for Indians. This is not a sound basis for a decision affecting 245 tribes on Indian reservations throughout the country. Furthermore, if a decision is to be made that the Agua Caliente Indians, or any others, are ready in terms of economics and their own competence to assume the burdens of taxation and are to be released from the guardianship of the United States, either completely or partially, the judgment is one best considered and made by Congress, and not by the courts. *United States v. Santa Fe Pacific R. Co.,* 314 U.S. 339 (1941); *Beacher v. Wetherby,* 95 U.S. 517 (1877); *Johnson v. McIntosh,* 8 Wheat. (U.S.) 543 (1823). Transfers or other acts of the beneficial owner of Indian land do not defeat the trust or any of its intended attributes such as tax exemption, and that only Congress is in a position to do. *Board of County Commissioners v. Seber,* 318 U.S. 705 (1943). The Supreme Court held in *Seber* that tax exemption followed the land stating:

> Respondents received the land . . . subject to restrictions of indefinite duration which the Secretary of the Interior had authority to impose. It

> seems only fair. . . . that *the tax exemption should follow the restrictions and continue so long as they do*, unless Congress meanwhile provides to the contrary. [Emphasis added]

318 U.S. at 713.

The control exercised by Congress over the permissible terms of leases on Indian lands has been extensive. For instance, the Indian Leasing Act, 25 U.S.C. §415, has been amended nine times since 1959 to allow leases up to 99 years on certain reservations, departing from the usual 50 year limit[8]. Each case was separately and carefully considered by Congress and, in spite of repeated recommendations by the Department of the Interior that the authority to enter into 99 year leases be extended to all reservations, Congress has rejected the suggestion. *See, e.g.*, H. Rep. 2346, September 12, 1962, accompanying H.R. 8113, which amended 25 U.S.C. §415, 1962 U.S. Code, Cong. and Admin. News, p. 2941; S. Rept. 829, November 30, 1967, accompanying H.R. 4919, which amended 25 U.S.C. §415, 1968 U.S. Code, Cong. and Admin. News, p. 2318. Congress has even enacted special statutes for certain reservations setting required terms and limitations based upon individual circumstances. *See e.g.*, 25 U.S.C. §§416-416j. Indeed, Congress has acted to eliminate tax exemptions in the case of specific types of leases on some Indian lands. *See e.g.*, 25 U.S.C. §§398c, 401. Congress is certainly better equipped than federal courts or the states to make judgments on a case by case basis regarding the unique circumstances of each tribe and its ability to pay taxes.

The determination of at what point Indians are prepared to assume the full responsibilities of citizenship, such as the

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[8]Congress's almost jealously guarded control over Indian leasing policy is an exercise of its plenary power over Indian affairs. *E.g., United States v. Hellard*, 322 U.S. 363 (1944); *United States v. Kagama*, 118 U.S. 375 (1886).

burdens of taxation, is a policy decision for Congress to make. By interpreting the acts of Congress in such a way as to remove an advantage intended for Indians, and by deciding that a state can engage in a practice of taxation which interferes with the important federal policy of encouraging leasing of Indian lands, the court below has necessarily made judgments best reserved to Congress. As stated in *United States v. Detroit, supra,*

> Wise and flexible adjustment of inter-governmental tax immunity calls for political and economic considerations of the greatest difficulty and delicacy. Such complex problems are ones which Congress is best qualified to resolve.

355 U.S. at 474.

The effect of the decision of the Ninth Circuit Court of Appeals in this case has been to alter the status of the Agua Caliente Indians by removing a special protection and property right intended for them by Congress. Further, the decision is precedent for the alteration of the special status of Indians throughout the country by any state which has or enacts a possessory interest tax. Thus, the holding is outside the area in which a court properly functions and the Supreme Court, in its supervisory role, should grant a writ of certiorari to the Court of Appeals so that the situation created can be rectified.

Conclusion

Certiorari should be granted in this case because of its profound importance to Indians. Imposition of a possessory interest tax upon Indian lands frustrates a clear federal policy favoring long term leasing by Indians and, generally, the policy of economic development of reservation resources.

The court's opinion below also avoids several important arguments which would nullify the tax based upon violation of federal statutes and regulations, interferences with tribal sovereignty, and federal preemption. Any or all of these additional reasons would reverse the holding in the Court of Appeals.

For the reasons set forth in this brief, *amici* urge the Court to grant certiorari so that this vitally important case can be decided properly on its merits.

Respectfully submitted,

Native American Rights Fund
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Dinebeiina Nahiilna Be Agaditahe

By David H. Getches

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